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SUPREME COURT, U.S.

NO. 82-5950

IN THE UNITED STATES SUPREME COURT

JANUARY TERM, 1983

AMOS G. SPENCER,

Petitioner,

v.

THOMAS ISRAEL, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied for three reasons: First, the instruction given by the trial court in this case satisfies the constitutional test for the reasons set forth in Pigee v. Israel, 670 F.2d 690 (7th Cir.), cert. denied, 103 S. Ct. 103 (1982). Second, the petitioner has not been denied equal protection. And third, any decisions from this court would have little to no effect on future trials in the various states, including Wisconsin.

ARGUMENT

The petitioner has asked this Court to issue a writ of certiorari to consider his claim that he has been denied equal protection of the law because some courts have ruled that the jury instruction given in his case is unconstitutional and other courts have ruled that it is constitutional.

The instruction cited by the petitioner on page 5 of the petition for writ certiorari is basically the same instruction considered by the United States Court of Appeals, Seventh

Circuit, in Pigee v. Israel. See 670 F.2d at 697, n.1, dissenting opinion of Judge Baker. The only difference is that in the petitioner's case the instruction included the language "and the person thus assaulted dies therefrom," and that language was not included in the instruction in Pigee. This was due to the fact that the petitioner was charged with murder and Pigee was charged with attempted murder. In Pigee, the United States Court of Appeals for the Seventh Circuit concluded that the jury instruction did not infringe upon Pigee's constitutional rights. The respondent in the instant case submits that for the reasons set forth in Pigee, the instruction given in the petitioner's trial did not infringe upon his constitutional rights.

The petitioner argues that he has been denied equal protection of the laws because some courts have concluded that instructions like that given in his case were constitutional and other courts have concluded that they were unconstitutional. The respondent submits that the petitioner has not been denied equal protection. The decision in Pigee resolved the conflict in decisions among courts that considered instructions similar to that given in the instant case. The cases cited by the petitioner that considered Wisconsin jury instructions -- Austin v. Israel, 516 F. Supp. 461 (E.D. Wis. 1981); Harris v. Israel, 515 F. Supp. 568 (E.D. Wis. 1981); Dreske v. Department of Health and Social Services, 483 F. Supp. 783 (E.D. Wis. 1980), and Adams v. State, 92 Wis. 2d 875, 289 N.W.2d 318 (Ct. App. 1979) -- were decided before Pigee. See 670 F.2d at 696 n.15. The decision in Pigee resolved the conflict between those cases and the other cases cited in Pigee at 670 F.2d at 696 n.15.

The petitioner cannot claim that he was denied equal protection because the instruction in his case was found to be

constitutional and the instructions in other cases he cites were found to be unconstitutional. The petitioner cited Sandstrom v. Montana, 442 U.S. 510 (1979); State v. Arroyo, 180 Conn. 171, 429 A.2d 457 (1980); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981); State v. Kyle, 628 P.2d 263 (Mont. 1981); State v. Caldwell, 94 Wash. 2d 614, 618 P.2d 508 (1980), and State v. Savage, 94 Wash. 2d 569, 618 P.2d 82 (1980). The instructions given in those cases were not worded the same as the instruction given in the petitioner's case. Therefore, the petitioner cannot claim that he was denied equal protection simply because the instructions in those cases were found to be unconstitutional and the instruction in his case was found to be constitutional.

Because the decision in Pigee resolved the question of the constitutionality of the instruction given in the petitioner's case and because the instructions given in the cases for other jurisdictions differ from the instruction given in the petitioner's case, the petitioner was not denied equal protection because of the conflict in decisions over the constitutionality of the instruction given in his case. In fact, in light of Pigee, there is no conflict in the decisions over the constitutionality of that instruction.

Finally, because of the singular wording of the instruction at issue, and its replacement with different language in the Wisconsin standard jury instructions, a decision in this case would be of such limited effect that certiorari is not warranted. Research has uncovered no other jurisdiction utilizing an instruction qualified in the same way as the one given in the instant case. Consequently, a decision in this case will have no effect outside of Wisconsin. In addition, as the Seventh Circuit noted in Pigee, 670 F.2d at 696 n.16, Wisconsin no longer utilizes the

challenged language. Consequently, a decision in this case will have no effect on future cases even within Wisconsin.

CONCLUSION

For the reasons discussed above, the respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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March 10, 1983

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v.

THOMAS ISRAEL, WARDEN,

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AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
COUNTY OF DANE) ss.

DENISE SCHILLING, being first duly sworn, on oath deposes and says that on the 10th day of March, 1983, she served the Respondent's Brief in Opposition to the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit upon Amos G. Spencer, petitioner, appearing pro se, by depositing one copy of the same in a United States mail box, with first class postage prepaid, to him at the following address: Box 55, Stillwater, Minnesota 55082.

Denise Schilling
Denise Schilling

Subscribed and sworn to before me
this 10th day of March, 1983.

Judith M. Waddell
Notary Public, State of Wisconsin
My commission: Expires 2/8/87